AILA/Department of State Liaison Meeting
October 6, 2016
AGENDA

1. Foreign Affairs Manual Update

a. At the April 7, 2016, liaison meeting with AILA, the Visa Office (VO) indicated that it would update the Foreign Affairs Manual (FAM) to harmonize 9 FAM 403.9-4(E) (nonimmigrants may be admitted in TN status for a maximum period of one year) with 9 FAM 402.17-9 and 8 CFR §214.6(e) (authorizing admission of TN nonimmigrants for up to three years). What is the estimated date for completion of this change?

9 FAM 403.9-4(E) has been update to reference the correct maximum period of admission.

b. On March 8, 2016, AILA presented to VO a set of policy recommendations relating to the FAM provisions outlining procedures for obtaining L classification. An abridged copy of the recommendations is attached at **Appendix A**. The recommendations identify a variety of apparently outdated or inaccurate provisions in the FAM. Does VO agree that these provisions should be updated and if so, what is the status of the necessary updates?

We are in the process of revising 9 FAM 402.12. While we are still consulting with DHS, we expect the revisions to address the duration of individual petition validity and Canadian L petition guidance. There is no set schedule for completing the revisions.

Regarding the calculation of time spent in status, for purposes of blanket petition validity, the Department relies on ADIS data to verify arrival and departure information. We have no plans to amend the FAM to allow for secondary evidence.

2. Follow Up on System Updates

At the April 7, 2016, meeting with AILA, VO provided detailed information concerning the development of various data management systems improvements and pilot programs introducing procedural changes. Please provide an update on the following:

a. ConsularOne System

1. Is the ConsularOne Online Passport Renewal service still scheduled to be deployed domestically in calendar year 2017?

Yes, the Online Passport Renewal service is still scheduled to be deployed domestically in calendar year 2017.

2. Has a schedule been established for introducing the electronic Consular Report of Birth Abroad service for scheduling appointments and uploading documents?

Yes, the electronic Consular Report of Birth Abroad service is scheduled to deploy in the fall of 2017.

3. Is there an anticipated timeline to introduce nonimmigrant visa process functionalities?

Nonimmigrant visa functionality will be implemented in a future phase of the ConsularOne project. We expect formal requirements gathering to take place in calendar year 2018 and deployment of the modernized visa system in calendar year 2020.

b. Visa Modernization Proposal

1. Is the Enterprise Payment System (EPS) for passport applications on schedule to be implemented by the end of 2016?

Yes, the Enterprise Payment Service (EPS) will be deployed in December of 2016 and will be initially used by legacy systems. The Online Passport Renewal service will use EPS when deployed in calendar year 2017.

2. Are immigrant visa payment services still scheduled to be introduced at the same time that the EPS is implemented?

Yes, EPS will be used.

c. Modernized Immigrant Visa Pilot Program

1. The Consular Electronic Application Center (CEAC) portal for immigrant visa processing for six pilot posts was scheduled to launch in August 2016. What is the status of that initiative?

Due to a need to focus attention and resources on improving cyber security across government agencies, CA has revised the full end-to-end pilot start to Spring 2017, with a go-live target in April at the six round-one posts. Participants in the full pilot will be able to access an enhanced customer portal via CEAC through which they may update petition information while the case is at NVC, including adding/removing family members, updating Accompanying/Follow-to-Join status, updating contact information (including email addresses), adding sponsor information, and uploading scanned documents directly to their case. Case status changes will be emailed to anyone associated with the case whose email address has been added via CEAC, eliminating the need for the filing of new DS-261 forms.

The pilot CEAC portal is expected to launch in April, 2017. The pilot will allow applicants who file petition forms I-130 or I-129F to opt-in to the improved CEAC processing module if the applicant's case is processing in one of the following posts:

- Buenos Aires, Argentina
- Frankfurt, Germany
- Hong Kong, China

- Montreal, Canada
- Rio de Janeiro, Brazil
- Sydney, Australia

2. Has a schedule for expanding the MIV program to additional posts been established?

If the initial pilot testing is successful, we will expand the pilot to around eight more posts in late summer or fall of 2017. All petition types will be included by the time worldwide rollout begins, following successful completion and evaluation of the expanded pilot.

d. Interview Waiver Program

1. Are there any plans to further expand the Interview Waiver Program (IWP)?

In consultation with interagency partners, we will consider expanding IWP as we identify additional, secure applicant populations. Earlier this year, the Secretary of State determined that it was in the national interest to waive interviews, unless required in certain instances, for first-time Argentine nonimmigrant visa applicants in visa classes other than E, H, L, P, or R who are younger than 16 or 66 and older, effective May 16, 2016.

2. Has State identified any other options for improving visa application services through the IWP?

State views prudent use of IWP as an efficient and secure method to meet rising demand for nonimmigrant visas and continues to explore options for expanding its use under appropriate circumstances.

3. Is State considering reintroducing the domestic visa revalidation program for any visa categories?

We continue to explore options to improve our services for all categories of visa applicants, consistent with existing statutes, regulations, and our commitment to national security.

3. "Permanent Resident" for Purposes of Form DS-160. At the April 7, 2016, liaison meeting, VO indicated that it planned to develop and post on travel.state.gov an FAQ explaining the meaning of the term "permanent resident" as contemplated by the recently added question on Form DS-160. What is the estimated date for the development and posting of the FAQ or integration of the definition into the DS-160 as a user note?

The Visa Office has drafted a help topic that will be displayed in the DS-160 to the right of the question. The help topic will be released with the next update the DS-160, which currently is not scheduled. In the interim, we have added the help topic to the DS-160 FAQs on the TSG.

4. **Blanket L Issues.** Following our meetings in October 2015 and April 2016, VO addressed blanket L issues at length. However, employers utilizing the blanket L process and their workers continue to encounter a wide range of endorsement and annotation practices that do not comply with FAM policies and uncertainty remains about how to effectively and efficiently resolve them.

   According to the written responses from April 2016, applicants must seek correction of errors made either in the endorsement of Form I-129S or in the annotation on the blanket L visa foil through the issuing post.

   a. Based on our discussions, we understand that applicants can send incorrectly endorsed Forms I-129S back to the consulate (by courier, mail or other delivery service) for correction even if the individual is present in the U.S. Is this correct?

      This is not correct. The visa applicant and/or legal representative should contact the consular section via the method noted on their website to notify them of the error and to request a correction. Whenever possible, such errors should be reported to the consular section for correction before the beneficiary's travel to the United States to prevent any problems at the port of entry.

   b. We also understand that annotation errors in the blanket L visa foil must be corrected while the individual is physically present within the consulate's jurisdiction since corrections require that the passport and visa be provided. Is this correct?

      Yes.

   c. During the April 2016 meeting, VO also explained that it had established a team to sample consular compliance with the FAM blanket L Form I-129S endorsement and visa annotation policies. Since blanket L visa applicants continue to experience a wide variety of variations in endorsement and annotation practices, please confirm whether this was a one-time event or an on-going effort.

      VO does not have an established team for consular compliance with endorsement and annotation policies. However, VO staff does provide guidance to posts and perform spot checks in an ongoing effort to ensure compliance with these policies. We welcome AILA periodically providing names of posts that have been most problematic in this regard, including descriptions of the frequency and examples of problematic endorsements and annotations on visas issued at the post, to allow us to conduct targeted follow-up. The information may be provided through the Chair of the State Department Liaison Committee to the Director of Legal Affairs.

      i. If so, is there a mechanism by which AILA could alert VO of consulates that have a pattern of incorrectly endorsing or annotating blanket L documents?

         There currently is no such mechanism, but the information may be submitted by the Liaison Committee Chair to the Director of Legal Affairs, as offered above.

ii. If not, would VO consider setting up an email address (or a dedicated subject heading for an existing email address) to receive such notifications? (We note that NVC has adopted such a practice for receiving alerts about process issues to successfully resolve them).

Thank you for your suggestion, however, VO does not currently have the staffing to attend to such a mailbox. We encourage AILA to continue to bring these concerns and specific examples to our attention during the regularly scheduled DOS-AILA meetings.

d. Based on discussions with VO on October 8, 2015, we understand that an endorsed Form I-129S has the equivalent effect of a Form I-797, Notice of Action confirming approval of an individual L-1 petition in determining the period for which an individual is approved for L-1 classification. Is this correct?

Yes.

e. Pursuant to 9 FAM 402.12-8(F)(c)(1): "The consular officer must determine the validity dates for the I-129S petition. For initial Blanket L applicants, this date should either be three years or based on the 'Dates of intended employment' as written in Part 4, question c [now Part 2, question 2] of the Form I-129S by the petitioner, whichever is less." In response to questions posed at our April 7, 2016 meeting, VO indicated that: "Three years *from the date of adjudication* is the maximum period for which consular officers may endorse a Form I-129S (9 FAM 402.12-8(F))." (Emphasis added). This additional limitation can substantially reduce the period of validity of an endorsed Form I-129S.

Nonimmigrant workers rarely apply for a visa immediately before relocating to the United States for a temporary assignment. Companies normally plan visa applications well in advance of the employment start date, and employees want to know that they will have a visa in hand prior to making decisions regarding housing, spousal employment, and their children's education. The FAM appears to contemplate these practical considerations by authorizing posts "to accept L visa applications and issue visas to qualified applicants up to 90 days in advance of applicants' beginning of employment status as noted on the Form I-797 or I-129S." (9 FAM 402.12-17(A)(c))

By limiting the maximum period for which a Form I-129S may be endorsed to three years *from the date of adjudication*, however, blanket L workers and employers are penalized for planning ahead. AILA encourages VO to revisit the policy of limiting the maximum period of endorsement of Form I-129S to three years from the date of endorsement.

Consistent with State's previously stated position that an endorsed Form I-129S has the equivalent effect of a Form I-797 for defining the period for which a beneficiary is approved for L-1 classification, AILA encourages VO to adopt a policy authorizing the endorsement validity dates for Forms I-129S to be either the "Dates of intended employment" as written in Part 2, question 2, of the Form I-129S or for a period of three years beginning on the indicated employment commencement date, whichever is less."

Thank you for bringing this to our attention, we will take this suggestion under consideration.

f. Members report that U.S. consulates in Mexico no longer place an ink stamp on endorsed Forms I-129S and instead write in the dates of endorsement. Blanket L workers applying for admission at ports of entry are being asked by CBP why their Form I-129S has no ink stamp.

i. Is an ink stamp required for a valid endorsement of Form I-129S?

Consular officers are encouraged, but not required, to use an ink stamp to endorse the I-129S. We require officers to note their post, their name, and provide a signature or initials.

ii. Has State discussed this issue with CBP to confirm whether or not a properly endorsed Form I-129S requires an ink stamp issued by a consulate? If so, what was the outcome of the discussion? If not, would DOS be willing to do so?

We have worked closely with CBP on our I-129S endorsement requirements and guidelines. VO will contact CBP about this issue. However, please keep in mind that CBP has sole authority over admissions requirements.

5. **Five Year Visas for Petition-based Nonimmigrant Categories other than L.** It is our understanding that L visas are issued with a validity period up to the reciprocity limit rather than the petition expiration date as a result of the introduction of a clause in an international trade agreement with South Korea providing for that benefit. Decoupling L visa validity from the underlying petition was then given universal application under the most favored nation clause of other trade agreements and codified at 77 Fed. Reg. 8199 (Feb. 14, 2012). Over the last several months, AILA has received reports from members of other petition-based nonimmigrant work visas, such as H-1B and R, being issued for up to the five-year reciprocity limit.

a. Please confirm whether the L visa regulations that decouple visa validity from the underlying petition validity was intended to apply to all petition-based nonimmigrant work visas, or only to L visas.

The regulation only applies to L visas. The validity of all other petition-based visas must be limited to the length of the petition or by the prescribed validity on the reciprocity schedule, whichever is less.

b. If the change refers only to L visas, what is the legal basis for issuing H-1B or R visas with a five year validity?

The change only refers to L visas. As noted above, the validity of all other petition-based visas must be limited to the length of the petition or by the prescribed validity on the reciprocity schedule, whichever is less.

c. Would an H-1B or R visa issued to an individual with five-year validity also need to be corrected, or can it be used for up to three years commensurate with the underlying petition?

The applicant and/or legal representative should contact the consular section in the event that an H-1B or R visas is incorrectly issued with five-year validity and request that a new visa foil be issued.

6. **CSPA and the Immigrant Visa Filing Date Chart.** There appears to be some confusion about the significance of the Filing Date charts for purposes of locking in the age of a child under the Child Status Protection Act (CSPA). Please confirm that the "Final Action Date," when an immigrant visa number is actually available, is the relevant date from which an applicant must have "sought to acquire" permanent resident status within one year. Please also confirm that the filing of an application under the "Dates for Filing" chart will serve to freeze the applicant's age and confer CSPA benefits.

Under current guidance, an applicant has to seek to acquire within one year of the "Final Action Date" to benefit from CSPA's age-out protection. The National Visa Center (NVC) uses the "Dates For Filing" to determine when an applicant can begin to file an IV. If an applicant files a DS-260 after being contacted by NVC, this will satisfy CSPA's "sought to acquire" requirement." When a principal or derivative applicant successfully seeks to acquire, his or her CSPA age will be calculated using his or her actual age on the date the priority date is current under the "Final Action Date," minus the number of days when the petition was pending with USCIS.

7. **Application of §214(b) in Cases with a §212(a) Ineligibility.** We understand from previous discussions with VO that it is common practice to make a §214(b) determination before reviewing any potential ineligibility under §212(a). However, AILA has seen an increase in cases refused under §214(b), where there is no reasonable basis for a §214(b) determination, but there is an acknowledged §212(a) ineligibility but the applicant would be eligible for a waiver. Moreover, AILA has been advised that in several cases where a §212(a) determination was made and a waiver was not recommended, officers will refuse the case under §214(b) following a request for an advisory opinion. What guidelines are consular officers given with regard to §214(b) determinations in cases where a §212(a) ineligibility also exists? What instructions are consular officers provided when an applicant (or his/her attorney) requests an advisory opinion in a case where the officer has not recommended a waiver?

By stating that there are applicants for whom "there is no reasonable basis for a §214(b) determination," the question reverses the burden of proof required by the INA. Section 214(b) creates a presumption that the applicant is unqualified for the nonimmigrant visa sought until the applicant establishes to the satisfaction of the consular officer that he or she is "entitled to a nonimmigrant status under 101(a)(15)." Per §291 of the INA, the burden of proof is always upon the alien. If an applicant is evasive or otherwise engages in behavior that causes the consular officer to doubt his or her credibility, then it becomes harder for the consular officer to be satisfied that the applicant has demonstrated his or her eligibility for the visa sought.

Guidelines provided to consular officers regarding §214(b) determinations in cases involving a §212(a) grounds of ineligibility can be found at 9 FAM 302.1-2. Section 302.1-2 instructs officers that they may refuse most nonimmigrant visas under either §214(b) or §212(a), or both, if applicable. These notes also instruct officers that the "applicant's failure to convince you that he or she meets any one of the specific requirements of the applicable NIV category will result in an INA 214(b) denial." 9 FAM 302.1-2(B)(4)(a). The FAM guidance also instructs consular officers that a §214(b) refusal may be "overcome if the applicant demonstrates to your satisfaction that he or she lawfully meets and will abide by all the requirements of the particular NIV classification." 9 FAM 302.1-2(B)(4)(c). The FAM section further provides:

> [T]he applicant must make a credible showing to you that all activities in which the applicant is expected to engage while in the United States are consistent with the claimed nonimmigrant status. Proper visa adjudication requires you to assess the credibility of the applicant and of the evidence he or she submits in support of the application. INA 291 places the burden of proof at all times on the applicant. If you are not satisfied that the applicant meets the standards required by the particular visa classification for which he or she is applying, you must refuse the applicant under INA 214(b). This is the case regardless of the applicant's financial situation or ties abroad and regardless of whether there is sufficient evidence to refuse the applicant under another section of the law (for example, INA 212(a)….)

9 FAM 302.1-2(B)(6)(b) and (c).

Section 305.4-3 of 9 FAM instructs consular officers regarding when they may recommend a waiver as well as when they determine that a waiver under §212(d)(3)(A) is not warranted, but an applicant or the applicant's attorney requests an advisory opinion. This FAM provision instructs officers that they may "not refuse an alien's request to submit the waiver request to the Department." 9 FAM 305.4-3(E)(2)(b). Another portion of that section instructs officers that they must refer to the Department any case "in which the alien or the alien's representative… requests that a waiver be considered…." 9 FAM 305.4-3(E)(2)(d)(2). Finally, these FAM notes instruct officers that they cannot recommend an applicant who is ineligible under §214(b) for a waiver under INA §212(d)(3)(A). 9 FAM 305.4-3(B)(1).

8. **Information Sharing between State and USCIS.** AILA members report receiving USCIS denials of petitions for nonimmigrant workers based on information submitted on previous DS-160 nonimmigrant visa applications. Please provide additional information as to what information is shared between USCIS and State and how such information is shared.

The Department shares visa record information with USCIS, consistent with INA section 222(f), for the administration or enforcement of U.S. immigration law.

9. **Derivative Citizenship**

   a. **Proof of Citizenship.** It is our understanding that children born abroad to U.S. citizens may be considered citizens from birth, regardless of whether their birth was reported to State before the age of 18.

Children born abroad to a U.S. citizen may be considered to be a U.S. citizen at birth as long as the relevant statutory requirements are met, regardless of whether the child received citizen documentation before the age of 18.

i. If no report was made, what alternative documentation may such children present to prove U.S. citizenship, given that the transmitting parent would have to meet certain requirements such as previous residence in the U.S.?

The documentation that the Department of State would ask for depends on which statute is being relied on to transmit U.S. citizenship. Since citizenship transmission statutes have different requirements, the person seeking citizenship documentation should bring documents relevant to determining the circumstances of his or her birth. For example, a child is a U.S. citizen at birth if he or she is born outside the United States to two U.S. citizen parents and at least one parent had a residence in the United States prior to the birth of the child. So, the person applying for citizenship documentation under this statute would have to provide documentation of U.S. citizenship for both parents and evidence that one parent had a residence in the United States before the child was born.

ii. If citizenship is proven, from what date is the child deemed to be a U.S. citizen – the date of birth or the date of confirmation of citizenship?

If a person meets the requirements of the applicable citizenship transmission (birth abroad) statutes, the child acquired U.S. citizenship at birth. If the child meets the requirements of expedited naturalization statutes, the child is a U.S. citizen as of the date of naturalization.

iii. What documentation is required for a child disprove U.S. citizenship if a consular report was never made and the child does not wish to be a U.S. citizen? To what office should such documentation be presented?

If a person does not meet the requirements of any citizenship transmission statute, was not born in the United States, or was born in the United States but not subject to the jurisdiction of the United States at birth, then the person is not a U.S. citizen. If the person is requesting documentation from the Department that he or she is not a U.S. citizen, the individual should make an appointment at a U.S. Embassy or Consulate. The Department of State would consider all relevant documentation.

b. Birth on Military Bases. A recent amendment of the FAM affects the ability of fathers in the military to legitimize/transmit U.S. citizenship to children born out of wedlock abroad. Previously, 7 FAM 1133.2-2c(2)b provided, in the section "Birth Out of Wedlock to American Father":

> *The Immigration and Nationality Act defines 'residence' as the place of general abode of a person; his principal, actual dwelling place in fact, without regard to intent. Under this definition, a military base where a person is stationed, even for a short period of time such as a training assignment at an appropriate place, can*

be considered a residence and the laws of the state or country where the base is located can be considered for legitimation purposes.

The entire second sentence has been deleted, and now reads in part that "a military base cannot be considered a residence and the laws of the state or country where the base is located cannot be considered for legitimation purposes."

i. Why was this portion of the FAM amended?

The referenced section, **7 FAM 1133.2-2 Original Provisions and Amendments to Section 301** provides at paragraph (c):

> November 6, 1966, Addition of Proviso Relating to Compilation of Physical Presence For Transmission The Act of November 6, 1966, Public Law 89-770, (80 Stat. 1322) added additional qualifying U.S. physical presence categories to the 301(a)(7) proviso (see 7 FAM 1133.2-1).

To respond to this question, we would need AILA to identify the current FAM section at issue. Generally, a temporary duty assignment on a military base cannot be considered a residence because of the temporary nature of the stay; whereas, living on a military base for a period beyond temporary duty may be considered to be a residence, if the military base is shown to be the principal actual dwelling place. This explanation is consistent with the longstanding interpretation and implementation of what constitutes a residence.

ii. In light of the amendment, please confirm how residence for legitimation purposes is to be determined by consular officers adjudicating claims to citizenship by the children of U.S. military fathers born on military bases, either inside or outside of the country? Are consular officers required to consider the legitimation laws of the father's last known non-military residence in determining whether a child has been legitimated?

On November 14, 1986, Congress enacted "new" INA section 309. New 309 (a)(4) requires that the transmitting U.S. citizen father of a child born abroad out of wedlock establish a legal relationship with the child before the person turns 18 years of age. Unlike "old" 309 (a), which is silent as to which law applies to determine whether legitimation occurred, that of the father's place of residence or domicile or that of the child's, new INA 309 (a)(4)(A) specifies that the law of the person's (child's) residence or domicile must be used. Thus, the universe of cases in which the U.S. citizen father's place of residence or domicile is relevant is limited to persons with citizenship claims under "old" 309 (a). Therefore, the father's last known military residence may only be relevant in a limited number of cases under "old" 309 (a).

10. Validity of TN Visa with New Employer. Please confirm that, as is true in the H-1B context, a TN visa is not employer-specific. For example, if a Mexican citizen is issued a TN

visa based on a job offer with Employer A but subsequently obtains an approved TN petition for employment with Employer B, the TN visa remains valid until it either expires or is affirmatively revoked. Stated differently, please confirm that a TN visa issued based on presentation of documentation demonstrating an offer of qualifying employment with Employer A, remains valid for use by the nonimmigrant in possession of a valid Form I-797, Notice of Action approving TN classification with a different employer.

A TN visa is not employer specific. If the TN worker changes employers the visa remains valid until it expires or is revoked. When a worker changes employers, however, they should keep the I-797 approval notice for their records, and in case it is requested by a Department of Homeland Security official.

11. **Mexican TN Annotation**. At the DOS/AILA Liaison Meeting on October 18, 2011, VO indicated that it had "advised all U.S. visa-issuing posts in Mexico to annotate TN visas to show the proposed period of work for the visa applicant in the United States." See **Appendix B** for an excerpt of the meeting minutes. Certain U.S. consulates in Mexico City appear to have abandoned that policy. In email exchanges in August 2016, AILA was informed by Mexico City that Mission Mexico no longer follows that practice, whereas Ciudad Juarez reported that it continues to annotate TN visas with the intended period of employment. As found by State in 2011 after consultation with CBP, "this procedural change…[assists] CBP inspectors in determining the periods of admission for citizens of Mexico applying for TN status at the port of entry." Please confirm that VO will instruct posts to continue to annotate TN visas in this manner.

We continue to work with posts and other agencies to standardize annotations for TN visas. Once we have finalized this annotation, we will publish a FAM update so that it will remain standard.

12. **TN – Cedula Professional.** The U.S. Embassy and Consulates in Mexico website states that neither a "carta de pasante" nor a Mexican "diploma" is considered to be a degree for TN purposes. Rather, only a Mexican "titulo" is considered a degree for NAFTA purposes. AILA has received reports from members that posts in Mexico have been denying TN visa applications for applicants with a "titulo" that do not have the "cedula professional" (professional license). Please confirm that that only a "titulo" and not a "cedula" is required for a TN.

Acceptable evidence of a bachelor's degree equivalent in Mexico (licenciatura) can be either a "titulo" or a "cedula profesional." The "titulo" must have a stamp from the Mexican Secretary of Education (SEP) to be valid.

13. **Mission India**

a. **Update on Visa Appointments.** We note that visa appointment wait times in India are between 100 and 130 days at present, and we understand that this is due to country-specific staffing issues. Please provide an update on staffing and other steps that have been taken to reduce the backlog.

In the last five years the demand for visas to travel to the United States has increased 80 percent across India. In FY 2015, we processed over one million visa applications in India, issuing more than 113,000 H-1B visas and 80,000 visas to student and exchange visitors, more than at any time in history. Accommodating visa demand on such a large scale requires adequate staffing. We are encouraged by recent developments in our discussions with the Government of India about obtaining approval for additional consular positions to meet the needs of our growing, vibrant relationship. We will continue to work with the Indian government to resolve this situation.

b. Interview Waiver. The expanded interview waiver program (IWP) announced by Mission India in 2012 included "Temporary workers on H-1B visas (same classification with the same petitioner, and visa is still valid or expired within the last 12 months)." The webpage that contains that policy is still active on the Mission India website. However, the IWP has since been modified to include a broader group of applicants. The current instructions on the ustraveldocs.com website say that the IWP applies to "H or L (individual) or R visas, [if the] prior visa [is] in the same class [and] is still valid or expired within the last 12 months." In order to avoid confusion, could VO instruct Mission India to remove or archive references to the 2012 announcement on IWP from the websites of the various consular posts throughout India?

We will provide this feedback to Mission India.

14. F-1 Preference Opt-Out. What is the procedure for opting out of an F-1 upgrade when the parent naturalizes and the beneficiary wants to remain in F-2B under Section 6 of the CSPA? Should the attorney/applicant file a request with USCIS (local or overseas) or the NVC?

If notified of a petitioner's naturalization, NVC will change the category from F-2B to F-1 and send a letter to the beneficiary informing of their new visa category and the procedures for pursuing an opt-out, if desired.

Beneficiaries seeking to opt-out of automatic conversion from the F-2B category to F-1 should file a request with the USCIS District Office having jurisdiction over the beneficiary's place of residence.

Beneficiaries should also inform NVC of the submitted opt-out request with USCIS. NVC will then revert the case to the original F-2B category and continue processing the application

The District Office should notify the appropriate visa issuing office if the request has been approved. 9 FAM 502.1-1(D)(5).

15. Revocations and Status. Following the changes in visa revocation policy for DUIs in November 2015, please confirm State's position on when the revocation becomes effective. Based on statements made by VO in liaison discussions, our understanding is that the revocation becomes effective when the person departs the U.S.; upon departure, the visa may no longer be used to seek admission to the U.S. From previous discussions on this issue, we understand that it is VO's position that revocation does not affect status in the U.S.

For individuals in the United States, revocations based on DUI arrests are effective immediately upon the alien's departure from the United States.

However, we have received reports that USCIS has begun to deny immigration benefits, such as extensions of status or OPT for students whose visas have been prudentially revoked following a DUI arrest. This seems to be based on INA §237(a)(1)(B), which provides that aliens whose visas are revoked under §221(i) while in the U.S. are deportable. Is VO reporting these revocations to USCIS or ICE for potential enforcement action?

VO reports all revocations to ICE on a monthly basis and any terrorism-related revocations in real time. The reporting is informational and does not request or recommend enforcement action.

16. **E-3 Cases.** The Department of Labor requires submission of a new labor condition application (LCA) when the beneficiary's work location changes and the new location is outside of the initial Metropolitan Statistical Area (MSA). Should a copy of the new LCA be filed with the issuing Post?

Consular sections only need a copy of a new LCA in conjunction with a visa application. Therefore, aliens with valid E-3 visas or in E-3 status who had to obtain a new LCA should retain a copy and present it with any subsequent E-3 visa applications.

17. **F-1 Students in Public School.** If an F-1 student who attends public school and has not reimbursed the school becomes eligible for another nonimmigrant visa, is there a process for overcoming this ground of ineligibility (assuming no other inadmissibility issue is involved)? Can this be rectified by reimbursing the school(s) attended prior to the new nonimmigrant application visa? Would a letter from the school coupled with proof of payment, such as a cancelled check, be sufficient evidence to demonstrate that the issue has been rectified?

INA section 214(m) prohibits the issuance of F-1 visas to an applicant seeking to attend public school unless the student's attendance at a public secondary school does not exceed an aggregate period of 12 months, and the student has reimbursed the school district the full, unsubsidized, per capita cost of providing the education for the period of the alien's attendance. Secondary school is deemed to be grades 9-12. A public school system issuing a Form I-20, Certificate of Eligibility for Nonimmigrant (F-1) Student Status-For Academic and Language Students, for attendance at a secondary school must indicate on the Form I-20 that such payment has been made and the amount of such payment. School districts may not waive or otherwise ignore this requirement. If the Form I-20 does not include the requisite information, the student must have a notarized statement stating the payment has been made and the amount from the designated school official (DSO) who signed the Form I-20 (9 FAM 402.5-5(K)(3)). If the Form I-20 does not reflect such payment and the applicant does not present a notarized statement from the DSO that payment has been made, the adjudicating consular officer must refuse the F-1 visa application under INA section 221(g), until the applicant provides the necessary documentation demonstrating such payment has been made.

If an applicant is refused an F-1 visa under INA section 221(g) for not paying the full, unsubsidized, per capita cost of education at a public secondary school, he or she may apply

for another visa classification for another purpose of travel. The applicant would need to pay the cost of education if still pursuing the F-1 visa application in order to overcome INA section 221(g).

The five-year ineligibility for being a student visa abuser under INA section 212(a)(6)(G) only applies to an F-1 student who violates a term or condition under section 214(m). This ineligibility ground applies to an F-1 visa holder who entered the United States to study at a private institution and then transfers to a public secondary school in violation of section 214(m)(1). By its terms, section 212(a)(6)(G) renders the alien excludable "until the alien has been outside the United States for a continuous period of 5 years after the date of the violation. Per 22 CFR section 40.67 "(a)n alien ineligible under the provisions of INA 212(a)(6)(G) shall not be issued a visa unless the alien has complied with the time limitation set forth therein."

18. **Domestic Abuse Arrests: Referred to Panel Physicians.** It has come to our attention that the U.S. Consulate in Shanghai has been issuing letters requiring visa applicants who have been arrested for a domestic abuse related offense to attend a medical examination with a panel physician. See attached **Appendix C**. A FAM update from 2010 mentions referrals to panel physicians for "those with a history of alcohol-related arrests or convictions (e.g., driving under the influence – DUI, domestic violence)" and references an outdated FAM note (9 FAM 40.011). However, 9 FAM 40.011 has since been replaced by new FAM 302.2 which does not refer to domestic violence. Please confirm whether new guidance on the treatment of individuals with domestic abuse-related arrests has been provided to consulates. If so, is VO able to provide a copy to AILA? If not, what is the basis for the issuance of these letters by Shanghai?

VO does not have a policy requiring individuals with a history of domestic abuse to receive a medical examination. However, per 22 CFR 41.108, consular officers may require a nonimmigrant visa applicant to take a medical examination if "the consular officer has reason to believe that a medical examination might disclose that the alien is medically ineligible to receive a visa." The Centers for Disease Control and Prevention's (CDC) Technical Instructions for Physical or Mental Disorders with Associated Harmful Behaviors and Substance-related Disorders for Panel Physicians state that:

> The panel physician is to identify any harmful behavior that is associated with an applicant's physical or mental disorder. Only harmful behavior that is associated with a physical or mental disorder is relevant for the classification of U.S. medical eligibility; neither harmful behavior nor the physical or mental disorder by itself makes an applicant medically inadmissible. People can have multiple harmful behaviors that are not associated with a physical or mental disorder. Repetitive antisocial activities and harmful acts may warrant evaluation for personality disorders according to DSM criteria, and eventually provide a basis for the conclusion of inadmissibility. Because of the complexity of this issue, the panel physician might feel that a more specialized psychiatric examination is indicated.

In all cases where evidence of harmful behavior is present, including a history of domestic abuse, consular officers have the discretion to refer applicants to the panel physician if the officer believes their history of harmful behavior may be associated with a physical or mental

disorder, and therefore could result in a medical ineligibility under INA 212(a)(1)(a)(iii). The Visa Office clarified this guidance to the U.S. Consulate in Shanghai, and post had agreed to update their procedures and the language in the panel physician referral letters to reflect current FAM guidance.

19. **Rescheduling IV Interviews.** What is the procedure for immigrant visa applicants to request postponement and rescheduling of a consular interview where all NVC processing is complete but the parties need additional time to file an I-601A provisional waiver application under the new regulations that went into effect on August 29, 2016?

    Typically the NVC is alerted to an I-601A provisional waiver application and will hold the case at the NVC until they receive notification of a decision on the provisional waiver. Once NVC receives notification of either approval or denial of the waiver, they forward the case to the assigned post. If a case has already been sent to post, and the applicant decides to apply for the I-601A provisional waiver, they should contact the post where their interview will take place to request that the interview be rescheduled and to ensure that the case does not enter into termination due to a no-show for the appointment and no contact from the applicant. Each post has either an online contact form, or email address on their website that the applicant or their representative can use to alert the consular section of the application for the I-601A provisional waiver and to reschedule the interview.

20. **Mission Cuba**

    a. **Representing Minors/Disabled Applicants.** According to its website, the U.S. Embassy Havana does not permit attorneys to accompany visa applicants to their interviews or to participate in the interviews. Family members are permitted to accompany the applicant but only where the applicant is a minor or is disabled. An AILA member reports that a 4-year old applicant was taken into the post for an interview on his own while his lawyer was made to wait outside. Can VO please instruct posts to permit attorneys to accompany minors and disabled applicants if a family member is unavailable?

       Access policies for consular sections are developed and managed by each respective U.S. Embassy or Consulate. Embassy Havana expects minor children to be accompanied into consular sections by family members.

    b. **Documentation Review.** Members have reported that locally engaged staff in Havana greet nonimmigrant visa applicants while they are waiting outside the building for their interview and instruct them that no documentation other than the DS-160 confirmation sheet, proof of MRV fee payment, and an I-797 (if applicable) may be brought into the building. While we understand that a visa interview is not necessarily an exercise in documentation, we would appreciate if VO could look into whether there is a blanket ban on supporting documents in Havana. We would also appreciate it if the post could be reminded that interviewing officers make a determination whether evidence will be reviewed and that applicants should be permitted to enter the building with any evidence they may deem necessary.

       Embassy Havana allows visa applicants to bring whatever documentation they wish into the consular section, which applicants routinely choose to do. The Embassy's greeters

routinely collect the DS-160 confirmation page and proof of payment from applicants as part of the intake process. These documents are then returned to the applicant prior to his or her interview. At the time of the interview, the applicant possesses the DS-160 confirmation sheet, proof of payment, and any other documentation that they wish to share with the adjudicating officer.

21. HIV and Public Charge Issues. Despite the end of the HIV ban in 2009, the FAM still singles out HIV positive status and treats it differently than any other serious Class B medical condition. *See* 9 FAM 302.2-5(B)(2) Visa Applicants Infected with Human Immunodeficiency Virus (HIV) at **Appendix D**. While we acknowledge that it is appropriate for consular officers to examine public charge issues for all immigrant visa applicants, no other applicants, even those with serious health concerns, are subject to an effective presumption that "[i]t may be difficult for HIV-infected applicants to meet this requirement."

The public charge issue is dealt with sufficiently 9 FAM 302.8-2(B)(2), which provides officers with guidelines for making a public charge determination based on the totality of the circumstances, including the health of the applicant. 9 FAM 302.2-5(B)(2) targets HIV positive applicants in a discriminatory manner, and should be removed. If this section cannot be removed, please explain why a separate section discussing HIV positive applicants is necessary.

The public charge provisions in the FAM no longer reference HIV, as reflected in the relevant section below:

9 FAM 302.2-3(G) – (U) Basis of Medical Report in Determining Ineligibility Under Public Charge - INA 212(a)(4)

(CT:VISA-177; 09-15-2016)

a. **(U)** In addition to the examination for specific inadmissible conditions, the examining physician must also look for other physical and mental abnormalities that suggest the alien is likely to become a public charge.

b. **(U)** When identifying a "Class "B"" medical condition that may render the alien inadmissible under INA 212(a)(4) , the examining physician is required to reveal not only the full extent of the condition, but the extent of the approximate treatment needed to care for such condition. Based on the results of the examination, you must determine whether the disease or disability would be likely to render the alien unable to care for him or herself or attend school or work, or require extensive medical care or institutionalization. Thus, certain conditions (e.g., developmental disability) are no longer explicitly listed as inadmissible conditions. Instead, the examining physician's diagnosis and opinion regarding treatment and disability would be factors for you to consider in your "totality of the circumstances" analysis of admissibility under INA 212(a)(4). (See 9 FAM 302.8(B)(3).)

c. **(U)** When the alien's own resources are not sufficient or are not available for use outside the country of residence and sponsorship affidavits are accepted, the affidavits must include explicit information regarding the arrangements made or the facilities available to the alien for support in the United States during the proposed period of medical treatment and assurance that a bond will be available if required by DHS.

d. **(U)** Whenever an NIV applicant is seeking admission for medical treatment, complete information is required regarding the nature of the disease, effect, or disability for which treatment is being sought. (If action under INA 212(d)(3)(A) will be required, see 9 FAM 302.2-3(G) and 9 FAM 305.4.)

22. B-1 Missionary. Is someone who is ordinarily paid for work abroad from a U.S. source precluded from utilizing the B-1 classification? For example, a missionary is employed abroad by a U.S.-based church and is on the U.S. church's payroll. The church needs the missionary to come to the U.S. periodically (e.g., every three years) in order to visit churches, share his/her experiences, and to receive additional training.

A missionary employed by a U.S.-based church would not be eligible for a B visa per the guidance at 9 FAM 402.2-5(C)(1)(a)(3). That note provides that a consular officer may issue a B-1 visa to member of a religious domination "entering the United States temporarily for the sole purpose of performing mission work on behalf of a denomination…provided the minister will receive no salary or remuneration from U.S. sources other than an allowance or other reimbursement for expenses incidental to the temporary stay."

23. Legacy Yemeni Cases. While most cases that were pending in Yemen have now been transferred to alternative posts, AILA continues to receive reports of cases sent to posts in countries such as Algeria and Djibouti where the applicant cannot travel without a visa and cannot obtain a visa for purposes of attending the visa interview. Members have tried to contact NVC (via IVYemen@state.gov), where appropriate, and to contact the post where the applicant is resident; however, transfer request have been unsuccessful. What can applicants do in these cases?

Given the high demand for visa appointments worldwide and the large volume of transfer requests many consular sections overseas receive on Yemeni cases, some posts do not have the resources to accommodate all transfer requests. Many posts also decline Yemeni case transfer requests because they do not have an Arabic speaking staff to conduct visa interviews. If the request is based on an urgent medical or humanitarian need, applicants and petitioners are welcome to provide additional information to post for reconsideration. NVC will continue to work on cases whose transfer requests are denied, and they will be scheduled for an interview in Djibouti.

24. E-2 in Bolivia. We understand that effective June 10, 2012 the bilateral investment treaty between the United States and Bolivia was terminated but that the provisions of the treaty will continue to apply for 10 years to all covered investments existing at the time of termination. The list of treaty visa countries continues to list Bolivia as a party to an E-2 treaty. Could VO please either remove Bolivia from the E-2 treaty list or add a footnote explaining that it only pertains to those investments in existence at the time of termination?

Thank you for this question. The latest 9 FAM update includes the following footnote in 9 FAM 402.9-10:

Bolivian nationals with qualifying investments in place in the United States by June 10, 2012 continue to be entitled to E-2 classification until June 10, 2022. The only nationals of

Bolivia (other than those qualifying for derivative status based on a familial relationship to an E-2 principal alien) who may qualify for E-2 visas at this time are those applicants who are coming to the United States to engage in E-2 activity in furtherance of covered investments established or acquired prior to June 10, 2012.

Appendix A

To: David S. Newman, Director of Legal Affairs, Visa Office, Bureau of Consular Affairs, U.S. Department of State
From: The American Immigration Lawyers Association
Date: March 8, 2016
Re: FAM Provisions Governing L Classification

Introduction

At the conclusion of our discussion on the blanket L Form I-129S endorsement policy on October 8, 2015, the Visa Office (VO) generously offered to receive and review additional comments about the blanket L process from AILA. We greatly appreciate the time VO has devoted to this issue and for providing this opportunity. In the interest of defining a clear, consistent set of rules for the administration of the immigration process, a goal shared by both AILA and VO, we offer the following observations.

Following the reorganization of the Foreign Affairs Manual (FAM) and its re-publication on November 18, 2015, provisions governing L visas appear to be largely intact and unchanged. However, we respectfully suggest that some of these FAM provisions are outdated or contain information which has the potential to cause confusion among both consular officers and the public. We offer the following descriptions of a variety of technical issues appearing in the FAM, and make suggestions for revising the text to enhance its clarity.

9 FAM 402.12-7(A) Individual Petitions

In discussing the process for extending an individual L petition, 9 FAM 402.12-7(A)(c) indicates that an individual petition may be extended indefinitely. However, the period of validity of an individual petition extension is limited to two years.[1] Separately, while 9 FAM 402.12-7(A)(c) correctly repeats 8 CFR §214.2(l)(14), indicating that "[s]upporting documentation is not required" for the extension of an individual petition, in practice, USCIS always requires petitioners to produce such documentation.

We respectfully suggest amending 9 FAM 402.12-7(A)(c) to read:

> *To extend the validity of an individual L petition, the petitioner must file Form I-129, Petition for a Nonimmigrant Worker, with the jurisdictional DHS Regional Service Center. Supporting documentation* ***for petition extensions is generally required by DHS and specific rules govern the documentary requirements for petition extensions involving new offices,*** *in which case the petitioner must demonstrate that it is doing business, as described in 9 FAM 402.12-10 below, in order to extend the* ***validity of the individual petition****. A petition extension may be filed only if the validity of the original petition has not expired.*

9 FAM 402.12-7(C) Individual Petitions for Canadian Citizens

Canadian citizens do not require a visa to be admitted to the United States in L status. DHS regulations authorize the presentation of an L petition by a citizen of Canada concurrently with an application for admission in L status.[2] 9 FAM 402.12-7(C), which describes this DHS policy, appears to be overbroad and out of date.

Currently, 9 FAM 402.12-7(C) states, in part, a "Canadian citizen may present Form I-129 … to an immigration officer at a Class A port of entry (POE), a U.S. airport handling international

traffic, or a U.S. pre-clearance or pre-flight station at the time of applying for admission." However, 8 CFR §214.2(l)(17) limits the locations at which L petitions may be presented to "a Class A port of entry *located on the United States-Canada border* or at a United States pre-clearance or pre-flight station *in Canada*." The current FAM language suggests that an individual L petition may be presented at any Class A port of entry or pre-clearance or pre-flight station. CBP maintains pre-clearance or pre-flight stations at international airports in several countries (see http://www.cbp.gov/border-security/ports-entry/operations/preclearance) and has announced plans to expand these offices to additional countries in the future. Accordingly, the unqualified reference to both Class A POEs and preclearance stations appears to be overbroad. Furthermore, neither DHS regulations nor current CBP policy support the statement that an L petition may be presented by a citizen of Canada at a U.S. airport handling international traffic.[3]

We respectfully suggest amending 9 FAM 402.12-7(C)(a) to read:

> *A U.S. or foreign employer seeking to classify a citizen of Canada as an intracompany transferee may file an individual petition in duplicate on Form I-129, Petition for a Nonimmigrant Worker, in conjunction with the Canadian citizen's application for admission. A Canadian citizen may present Form I-129, along with supporting documentation, to an immigration officer at a Class A port of entry (POE)* ***located on the United States-Canada border or at a United States pre-clearance or pre-flight station in Canada.*** *The petitioning employer need not appear, but the Form I-129 must bear the authorized signature of the petitioner.*

Similarly, we suggest amending 9 FAM 402.12-8(E) to read:

> *Citizens of Canada seeking L status under a blanket petition must present the original and two copies of Form I-129-S along with three copies of the Form I-797, to an immigration officer at a Class A port of entry (POE)* ***located on the United States-Canada border or at a United States pre-clearance or pre-flight station in Canada****. The availability of this procedure does not preclude the advance filing of an individual L petition or a Form I-129S with the DHS Service Center where the blanket petition was approved.*

9 FAM 402.12-8(A) Blanket Petitions

[*Discussion Omitted*]

9 FAM 402.12-8(F)(c)(2) Determining Validity Dates of I-129S

The INA places limits on the amount of time that a worker can utilize the L-1 visa category.[4] L-1A workers are limited to seven years and L-1B workers are limited to five years.[5] However, only the number days that a worker was actually present in the U.S. should be counted toward the five or seven year period.[6] The current version of the FAM, revised on December 17, 2014, properly instructs consular officers to limit the validity of a Form I-129S, if necessary, to avoid exceeding the maximum period of L-1 eligibility and refers consular officers to 9 FAM 402.12-16(C) for guidance in calculating the amount of time that remains available to the worker. The FAM may be enhanced, however, by the addition of information and resources that may assist a consular officer in calculating the remaining time, including absences from the U.S. during the previously approved period of L-1 classification.

We respectfully suggest amending 9 FAM 402.12-8(F)(c)(2) to read:

For renewal blanket L applicants, you must not only consider what the petitioner is requesting, but also determine the applicant's remaining time under the maximum period of stay as outlined in 9 FAM 402.12-16(C). ***Only those days the alien is lawfully admitted and physically present***

in the United States in L status should be counted when calculating the remaining available time in L status. *In order to assist U.S. Customs and Border Protection (CBP) with ensuring Blanket L visa applicants are not admitted beyond their maximum period of stay, the consular officer must limit the approval dates of the I-129S when maximum period of stay will be reached prior to the dates requested by the petitioner. For example, if a blanket L-1A Executive* ***has already been present in the United States for a total of six years in L status,*** *you should limit the approval of the I-129S to one year* ***to minimize the possibility he or she would be*** *admitted in excess of the seven year maximum period of stay, even if the employer is asking for a longer period.*

An individual seeking a new Form I-129S and blanket L visa for a period of time that exceeds five years, for L-1B applications, or seven years, for L-1A applications, bears the burden of proving he or she remains eligible for L classification for the entire period of blanket L classification requested on Part 4 question c of Form I-129S. Examples of documentary evidence that may be presented to demonstrate days absent from the United States include, but are not limited to:

1. ***An applicant's admission record printed from the CBP.gov/I94 website;***
2. ***Copies of Forms I-94 demonstrating an applicant's admission dates;***
3. ***Copies of admission stamps to the U.S. or a foreign country in the applicant's passport(s);***
4. ***Airline boarding passes for international travel out of the U.S.;***
5. ***Contemporaneously kept records such as human resource logs, calendaring software, etc.***

[1] *See* 8 CFR 214.2(l)(7)(i)(A); 8 CFR 214.2(l)(12); and 8 CFR 214.2(l)(14).
[2] 8 CFR §214.2(l)(17).
[3] *Compare* 8 CFR §214.2(l)(17)(i) with 8 CFR §214.6(d)(2).
[4] INA §214(c)(2)(D).
[5] *Id*. *See also* 8 CFR 214.2(l)(12)(i).
[6] 9 FAM 402.12-16(C); USCIS Adjudicator's Field Manual 32.6.

Appendix B

AILA Department of State Liaison Meeting
Mexico City, Mexico
April 27, 2012

Annotation of Visas

16. Applicants have found that TN Visas issued at Mexico City are not always annotated to provide that person may be admitted for 3 years, even though the visa is valid for only 1 year. Is there any suggested process for ensuring that TN Visas issued at Consulate are so annotated?

The MCCA has agreed that this makes sense and will instruct Mexico posts to begin annotating TN visas with the 3-year admission information as requested.

AILA InfoNet Doc. No. 12050245. (Posted 05/02/12)

AILA Department of State Liaison Meeting
October 18, 2011

26. CBP agrees that citizens of Mexico may be admitted to the U.S. in TN *status* for up to three years even though the TN *visa* is limited to one year under the reciprocity schedule. Training issues persist, however, and CBP officers at the border or other port of entry frequently admit applicants for admission presenting a TN visa for only one year or through the date of visa expiration. The AILA/CBP liaison committee has asked CBP to post on its website a written statement provided by the committee that confirms its understanding that a nonimmigrant alien presenting a valid TN visa may be admitted up to three years. Pursuant to this position, the period of admission that CBP will authorize for a TN applicant for admission will be governed by the period of temporary employment requested in the letter or statement supporting the application of the TN visa or application for admission. To facilitate the admission of citizens of Mexico bearing TN visas, AILA believes that it would be beneficial guidance to CBP officers if DOS would annotate the TN visa stamp indicating the period of employment requested in the visa application supporting letter up to three years. Please confirm that VO will instruct posts to annotate TN visas in this manner.

Q25. The Department and CBP have discussed the concerns raised by AILA and have agreed to implement the proposed procedural changes. We have advised all U.S. visa-issuing posts in Mexico to annotate TN visas to show the proposed period of work for the visa applicant in the United States. We are hopeful this procedural change will assist CBP inspectors in determining the periods of admission for citizens of Mexico applying for TN status at the port of entry.

AILA InfoNet Doc. No. 11102420. (Posted 10/24/11)

Appendix C

U.S. Consulate General Shanghai

Consular Section
1038 West Nanjing Road,
Westgate Mall, 8th floor
Shanghai, China 200041
http://shanghai.usembassy-china.org.cn/

Date:

Dear Panel Physician:

Non-Immigrant Visa applicant [redacted] recently interviewed at the U.S. Consulate General in Shanghai. This applicant has a record of domestic abuse.

U.S. regulations now require that, if a visa applicant has been arrested for domestic abuse, that the visa applicant must be seen by an approved physician before the visa case can proceed.

Please evaluate this applicant's physical and mental health by completing the attached medical forms. You do not need to complete the vaccination portion of the medical examination. In addition to completing the medical forms, please answer each of the following questions:

1. Can this applicant be diagnosed with a mental disorder?
2. Is there current or past harmful behavior (threat to property, safety, or welfare of the applicant or others) associated with this applicant's disorder?
3. Is the harmful behavior likely to recur in the future?

Please write any additional comments about this applicant's physical and/or mental health in the space below:

Please send your findings directly to the main U.S. Consulate building in Shanghai (U.S. Consulate General, 1469 Middle Huai Hai Road, Shanghai, 200031) in a sealed envelope, along with a short letter on your official letterhead to the attention of the Consular Section. If you have any questions, please contact the Consular Section directly.

Sincerely,

Consular Officer

Appendix D

9 FAM 302.2-5(B)(2) Visa Applicants Infected with Human Immunodeficiency Virus (HIV)
c. Public Charge:

1) Under INA 212(a)(4) an immigrant visa (IV) applicant must demonstrate that he or she has a means of support in the United States and that he or she, therefore, will not need to seek public financial assistance It may be difficult for HIV-infected applicants to meet this requirement of the law because the cost of treating the illness can be very high and because the applicant may not be able to work or obtain medical insurance. You must be satisfied that the applicant has access to funds sufficient for his or her support. You need to consider the family's income and other assets, including medical insurance coverage for any and all HIV-related expenses, availability of public health services and hospitalization for which no provision for collecting fees from patients are made, and any other relevant factors in making this determination. See also the policy guidance on public charge inadmissibility that the former Immigration and Naturalization Service (now DHS) published in the Federal Register on May 26, 1999, at 64 FR 28589 (1999).

(2) There is no waiver possible for this inadmissibility; however, if the applicant is able to demonstrate that he or she has acquired additional insurance or funds which would be sufficient to overcome the inadmissibility, you may determine that the inadmissibility no longer applies.

(3) On November 2, 2009, CDC issued the HIV Final Rule removing HIV infection from the definition of communicable disease of public health significance effective January 4, 2010. Although HIV infection is no longer a ground of inadmissibility under section 212(a)(1)(A)(i) of the INA, the requirement that an HIV-infected applicant must demonstrate that he or she overcomes inadmissibility under section 212(a)(4) of the INA remains.

Agenda: J Visa Questions
AILA Liaison Committee Fall Meeting
October 6, 2016

1. Special Administrative Regions as Applied to INA §212(e). AILA members seek clarification with regard to how exchange visitors who last resided in one of the People's Republic of China's (PRC) Special Administrative Regions (SARs) (*i.e.*, Macau, Hong Kong) may comply with the two-year home residency requirement of INA §212(e). Hong Kong and Macau are not listed on the 2009 skills list. Please confirm that both Macau and Taiwan are considered independent of the PRC for skills list purposes, and that residents of these SARs cannot be subject to INA §212(e) triggered by the skills list fields applicable to the PRC. Clearly, residents of Hong Kong and Macau who are subject to INA §212(e) based on U.S. or home country funding or clinical medical training can comply with their obligations by residing in either Hong Kong or Macau, respectively. Does State consider residents of these SARs who spend two years in mainland China following completion of their J program as having complied with their 212(e) obligations? Similarly, can a resident of Hong Kong satisfy the two-year home residency requirement in Macau or *vice versa*? Does the answer to these questions vary depending on whether 212(e) was triggered by home country government funding as opposed to U.S. government funding or clinical medical training? Would a home country funding require residence within the SAR that provided the funding in order to comply with 212(e)?

In this complex area, it is important that prospective exchange visitors clearly understand the obligations they are assuming when choosing to enter the U.S. on a J visa. A comprehensive response would be a helpful tool for J-1 program sponsors and consular officers in advising prospective J visa applicants. As the response to this question may require various permutations, we respectfully request that State consider responding in chart form, similar to its response to NAFSA years ago (*See* May 24, 2007 letter from Stanley Colvin to Victor Johnson, Associate Director of NAFSA, attached) when clarifying the application of the repeat participation bars.

Hong Kong SAR, Macau, and Taiwan are considered independent of the PRC for 212(e) purposes, including with respect to the Skills List. Since Hong Kong, Macau, and Taiwan do not have a Skills List, J visa recipients from those regions cannot be subject to 212(e) based on the PRC's Skills List. They will be subject to 212(e); however, if they receive U.S. or home country funding, and if they are engaged in clinical medical training. Correspondingly, individuals subject to INA 212(e) can only fulfill their home residence requirement in the country of nationality and/or last residence, as provided in INA 212(e). If last residence and nationality differ, then the individual would be required to return to the place of last residence. Exchange visitors who were residents and nationals of the PRC may only fulfill the requirement in the PRC; those who were residents of Hong Kong may only fulfill their requirement in Hong Kong, etc.

2. Skills List. The State Department has not published an updated skills list since 2009. Are there any plans to publish a new skills list in the near future? Presumably, formulation of the

skills list takes into account various diplomatic interests, both of the United States government, as well as the government of the country at issue. Can the Department please share with AILA the process by which determinations are made to add or remove fields from the skills list for a particular country?

Previous Skills Lists were published in 1972, 1984, 1997, and 2009. Periodically, we reach out to countries asking for their skills list. This is a very burdensome exercise that we have done at approximately 12 to 13 year intervals. Each country decides whether or not it wants a Skills List and it decides which subject/skill areas to have on its list. If a country wishes to add or remove fields at any other time, it can make that request via a diplomatic note, and the list will be amended and published in the Federal Register at that time.

3. Reconsidering INA 212(e) in Europe Following Brexit. Under the assumption that a united and cohesive Europe is in the United States' interest, in light of the uncertainty following the Brexit vote, would State reconsider its current position that citizens of European Union (EU) member countries are not residents of all EU member countries for purposes of fulfilling INA 212(e)? In other words, would the State Department be willing to consider citizens and lawful permanent residents of EU member countries eligible to satisfy the two-year home residency requirement anywhere in the EU and not merely in their country of citizenship, regardless of what triggered 212(e)? Alternatively, would State consider enabling fulfillment in any EU member country where the 212(e) trigger was based on EU funding as opposed to funding from the government of the exchange visitor's constituent country government? A policy shift such as this could be a small diplomatic step in underscoring the United States government's support for European unity.

The EU is comprised of sovereign member states. Regarding the first part of Question 3, under INA 212(e), an exchange visitor who is subject to the two-year home residency requirement must complete the requirement "in the *country* of his nationality or his last residence [emphasis added]." To allow an exchange visitor from an EU member state to complete the requirement anywhere in the EU would require not a change in State Department policy but a change in U.S. law. Regarding the second part of Question 3, one "trigger" of the two-year home residency requirement is when "participation in the program for which [the exchange visitor] came to the United States was financed *in whole or in part, directly or indirectly*, by . . . the government of the country of his nationality or his last residence [emphasis added]." Given that the EU is funded by its member states, EU funding of an exchange visitor from an EU member state comes in part, indirectly, from the exchange visitor's country of nationality or country of last residence. Again, to allow such an exchange visitor to complete the two-year home residency requirements anywhere in the EU would require not a change in State Department policy but a change in U.S. law.

4. Scope of Advisory Opinions. What is the scope of Waiver Review Division's (WRD) authority to issue advisory opinions? Beyond opining as to whether an exchange visitor is subject to 212(e), it would seem that WRD would also be best positioned to opine as to whether an exchange visitor complied with the requirements of INA §212(e), given that the

J-1 visa is a special cultural exchange visa under the auspices of the State Department. Is this something that is within WRD's authority? If so, would that be within WRD's authority only in the context of a consular nonimmigrant or immigrant visa matter? If not, would that determination fall to LegalNet? If this assessment is within WRD's authority for consular matters, would WRD be willing to issue advisory opinions regarding this issue generally, even though such a determination might have an impact on L, H and permanent residency matters pending at USCIS?

The authority to determine whether an applicant is eligible for a visa is vested in the consular officer adjudicating the application. That determination includes INA 212(e) considerations, to the extent relevant. If the consular officer is unsure whether INA 212(e) applies in a given case, the officer may request an advisory opinion from WRD, as described in 9 FAM 302.10-7(C) Advisory Opinions. Similarly, the authority to determine eligibility for other immigration benefits is vested in DHS immigration officers. As a matter of Department policy and public outreach, WRD offers a public service of providing Advisory Opinions addressing whether J visa recipient are subject to INA 212(e), based on the Skills List, government funding, or status as a foreign medical graduate.

WRD does not investigate or opine on whether an individual has satisfied INA 212(e) requirements. The determination of whether an exchange visitor has resided in his country of nationality or last residence for two years is made by the consular officer or immigration officer adjudicating an application for a visa or another immigration benefit.

While WRD may respond to requests from those who will apply to adjust status in the United States, particularly if that context is not clear in the request, such requests are not recommended, because we do not know whether USCIS adjudicators will be influenced by WRD opinions. Requests relating to INA 212(e) should not be sent to LegalNet.

5. EV Preferences for Multiple Waiver Filings. AILA acknowledges State's position that when an exchange visitor pursues more than one type of 212(e) waiver, once DOS recommends one waiver application, it will not consider the other. However, multiple waiver applications may be filed simultaneously, and many exchange visitors have a particular preference that one waiver be approved over the other in the event that State is otherwise inclined to recommend both. For example, J-1 physicians may prefer to obtain a waiver based upon hardship but, in light of their inherently subjective nature, may choose to file both a hardship waiver application and a clinical J-1 waiver application.
AILA respectfully requests that State consider a process whereby, if two waiver applications under different legal theories are received for a particular exchange visitor, the WRD will hold any other waiver application in abeyance until the preferred waiver reaches the WRD for adjudication. Notification of the preference of one waiver over another could be indicated by the applicant at the time of filing the DS-3035 (perhaps in the open field that appears under the Statement of Reason), or via any other method WRD deems expedient.

Managing multiple concurrent applications from the same applicant would be difficult for WRD to achieve, would delay adjudications, would have a negative impact on the overall waiver process, and consequently, would adversely affect service to exchange visitors generally. When an applicant submits multiple waiver applications, the WRD adjudicates the first complete application (meaning all required documents are in the case file). If an applicant receives a favorable recommendation, the WRD will not consider another application. Since a favorable recommendation nullifies the 212e requirement, it is not necessary to adjudicate another case for the same applicant. However, if the applicant receives an unfavorable recommendation, the WRD will consider another waiver application.

6. Fiscal Year State 30 J-1 Waiver Allocations. INA §214(l)(1)(B) permits each state Department of Health to recommend up to 30 clinical J-1 waivers per fiscal year. Please confirm that a clinical waiver is valid and counted against a particular fiscal year's quota even if the final approval notice is not issued until after the start of the following fiscal year. For example, where a state Department of Health recommends a J-1 waiver on August 30, 2016, but USCIS does not issue the approval notice for that waiver until October 30, 2016 (i.e., after the start of FY2017), is the waiver nonetheless valid and counted against the state's quota of 30 for FY2016?
Similarly, at what point during the J-1 waiver process is a state Department of Health's recommendation of a J-1 waiver counted against the state's quota of 30 per fiscal year? Is it the date the state sends its recommendation to the Department of State, the date that State receives that recommendation, the date State recommends the waiver, or some other date?

Conrad State 30 Program waivers are counted against the state's allotment when they are received in the WRD. A Conrad waiver that is post-marked on or before September 30 is counted against the state's quota for the fiscal year if a waiver is recommended, provided the state has not surpassed its allotted 30 Conrad waivers for that year.

7. Conrad 30 FLEX Waiver Slots for Telemedicine. Technology is making it possible for most professionals to perform their jobs remotely. In the medical field, telemedicine allows patients to receive access to and treatment from physicians, often in situations in which they would otherwise go without needed healthcare. Healthcare providers in rural underserved areas are increasingly relying upon the use of telemedicine services to connect patients who reside in medically underserved areas with physicians who practice elsewhere. INA §214(l)(1)(D)(ii) provides that a state Department of Health may recommend up to ten of its 30 J-1 waivers per year to physicians who are not physically located in a federally designated medically underserved area but "who will practice in a facility that serves patients who reside in one of more geographic areas so designated by the Secretary of Health and Human Services (without regard to whether such facility is located within such a designated geographic area) ...." Please confirm that, if a state chooses to use one of its ten FLEX waiver slots to recommend a waiver for a physician for a telemedicine position (in which the physician will provide full-time care remotely from a non-underserved area to patients who reside in underserved locations), the Department of State has no objection to such an arrangement provided that all other statutory and regulatory requirements are met.

At this time, the Department would take the position that telemedicine does not meet the requirements of INA 214(l)(1)(D)(ii) and regulations at 22 C.F.R. 41.63(e)(3)(iii), which refer to employment "in a facility" that serves patients residing in a Department of Health and Human

Services designated health professional shortage area. Presumably, at the time of enactment of Section 214 (1)(1)(D), Congress intended the 10 FLEX slots would be used for J-1 physicians who agreed to work in-person at a qualified facility; however, we recognize that, at the time of enactment, telemedicine was not an accepted form of practice. Consequently, we will consult with Department of Health and Human Services on the legal availability and appropriateness of any possible alternative interpretation of the language.

8. Technical fixes

a. At our October 18, 2011 meeting, AILA asked whether it would be possible to update Form DS-3035 to enable applicants to save it in draft form in order to make corrections or additions before or after submitting the form. WRD stated that it planned to add functionality to the form to allow changes prior to submitting the form. During our subsequent meetings in October 2012, April 2013, and October 2014, we were advised that the Computer Assisted Technologies Division was still working on upgrades to the DS-3035. As it has now been 5 years since State indicated it would work to provide this functionality, can WRD please provide a specific timeframe for resolution?

At this time, the WRD does not have a specific timeframe for completion of a new Form DS- 3035, but will inform AILA when the form has been updated.

b. In question 16 of the October 2011 agenda, AILA also raised the need for a data fix to allow WRD to include more than one worksite and employer sponsor on the J-1 waiver recommendation to ensure that the I-612 waiver approval issued by USCIS reflected the correct sponsor(s) and site(s) at which the J-1 physician must comply with his/her waiver obligations. When does WRD expect that this data fix will be implemented?

The WRD is forwarding waiver recommendations to USCIS with more than one employer and work site. USCIS has confirmed that they are receiving the data.

c. Several times in recent years AILA has alerted USCIS and State that the wrong attorney of record consistently receives I-612 (J-1 waiver) receipt and approval notices from USCIS. USCIS recently confirmed that the root of the problem relates to how the attorney data is transmitted between State and USCIS's Vermont Service Center. USCIS reported that State would issue a change review request for the waiver review system which would need to be reviewed and approved before implementing the fix in the State Department's system. We thank WRD for working with USCIS in getting to the origin of this problem. Please advise on the status of this data fix and when we can expect it to be implemented.

Our efforts to date seem to confirm that the WRD identifies the correct attorney of record on the waiver recommendation letters that it submits to USCIS. We understand USCIS also receives an electronic file from the WRD with information pertaining to the attorney of record (e.g. name of attorney, name of firm, contact information, etc.). We believe the information provided by the WRD on its recommendation letter can be cross-referenced with the information provided in the electronic file to confirm the correct attorney of record, but we continue to review this issue. We recommend that AILA follow up with USCIS on this issue as well.

9. Communication Protocols. Please confirm the method of communication WRD prefers

attorneys and J-1 applicants to use when:

a. **An edit is required to a DS-3035 after it has been submitted electronically:** During our October 2011 meeting, WRD indicated that minor corrections or changes to the DS-3035 could be communicated via email (212ewaiver@state.gov) and that more substantive changes or additional documents such as support letters could be 4mailed to the Waiver Review Division (U.S. Department of State, CA-VO-DO-W, SA-17, 11th Floor, Washington, DC 20522-1711). Is this still accurate?

WRD's official mailing address is:

Waiver Review Division
U.S. Department of State
CA/VO/DO/W
SA-17, Floor 11
Washington, DC 20522-1711

b. **A new DS-2019 is issued to the J-1 waiver applicant while the DS-3035 is pending:** During our October 2011 meeting, WRD indicated that a new DS-2019 issued during the waiver process could be faxed to the WRD at (202-485-7696). Is that still accurate?

Yes, this is accurate.

c. **The applicant needs to obtain documents submitted as part of a prior J-1 waiver process:** May the applicant or the attorney submit a request for such documentation via email (212ewaiver@state.gov)?

Yes, the applicant or his or her attorney may submit a non-FOIA request for documents from a prior waiver file via 212ewaiver@state.gov. Please note that waiver files with favorable recommendations are purged after one year, and files with unfavorable recommendations are purged after five years.

During our October 2011 meeting, WRD indicated that inactive J-1 waiver files are closed after two years and may be reactivated through the submission of new or relevant documents without requiring payment of a new fee, but noted that the policy was under review and subject to change. Has WRD reviewed this policy, and has it changed since 2011?

This policy has not changed. An inactive file is closed after two years, but an applicant may request to reactivate a case file with no new fee required if the applicant has already paid the processing fee.

10. Training of Foreign Service Officers on J-1 Issues and INA § 212(e). It is critical that program sponsors and consular officers correctly and clearly advise prospective exchange visitors regarding their cultural exchange obligations generally, and more specifically whether or not they are subject to INA §212(e) to ensure that the exchange visitor has

appropriate expectations about the responsibilities they will incur upon admission in J-1 status. AILA members have observed numerous J-1 visas improperly annotated as indicating that the exchange visitor is subject to INA §212(e) when they are not or vice versa. What steps is the Bureau of Educational and Cultural Affairs taking to ensure that both J-1 program sponsors and consular officers are properly trained on INA §212(e)?

The training curriculum for consular officers is intense and extensive and includes detailed training on J-1 issues and INA 212(e). Consular officers are constantly reminded to properly annotate visas based on the information from the applicant and on the form DS-2019, Certificate of Eligibility for Exchange Visitor Status, and in SEVIS and in accordance with guidance in 9 FAM 402.5-6(L). The consular officer adjudicating a visa application is responsible for determining applicant eligibility, but as explained in 9 FAM 302.10-7(C) Advisory Opinions, if the consular officer is unsure as to whether INA 212(e) applies to the J applicant, an opinion may be requested from CA/VO/DO/W. An exchange visitor, or an attorney acting on his or her behalf, also can request an advisory opinion from the Waiver Review Division regarding the applicability of INA 212(e) to the applicant.

The Department does not generally provide training to program sponsors on INA 212(e), but it does publish extensive information on relevant requirements. The Exchange Visitor Program regulations require that sponsors provide exchange visitors "pre-arrival" information, which includes, but is not limited to, information on the physical two-year home residency requirement. The pre-arrival information helps to inform prospective exchange visitors of the responsibilities they have if they are subject to 212(e). To help Exchange Visitor Program-designated sponsors to better understand 212(e), the Department has provided information on the two-year home residency requirement on the Form DS-2019 and in the Consular Affairs section of the Department of State website at www.state.gov.

The Department and its implementing partners work together to help exchange participants in ECA-funded exchange programs understand the purpose of the Exchange Visitor Program as well as the two-year home residency requirement. ECA-funded exchange participants are typically informed of their obligations when they receive pre-arrival information and during their orientation. In addition, they may be reminded of 212(e) during and/or at the conclusion of their respective program.

The fact that the vast majority of participants abide by the two-year home residency requirement indicates that most participants are aware of the 212(e) requirement. Still, ECA is willing to consider any appropriate recommendations for steps that may help further ensure that prospective exchange visitors are properly and consistently advised on their subjectivity to 212(e), when applicable, and on the expectations about meeting that obligation. However, more specificity as to which program(s), program sponsor(s), and/or circumstance(s) in which any inconsistency has been observed would be helpful.

11. U.S. Government Funding as INA § 212(e) Trigger. We understand that when U.S. government funding triggers the two-year home residency requirement, that trigger applies regardless of the amount of the funding and regardless of whether the exchange visitor repaid those funds. We also understand that WRD consults with the funding agency to determine if they support the waiver application. Can WRD please elaborate on the process it follows

when adjudicating a waiver application involving U.S. government funding? Is there a weighing of competing interests and if so, how does this occur? Does WRD sit in a committee session to review the waiver request? We understand that typically a no objection letter would not be relevant to, nor even if relevant (due to an additional skills list trigger) sufficient to overcome the interest of the funding agency, and that even interested government agency (IGA) waiver recommendations do not guarantee that WRD will recommend a waiver. While AILA realizes that many competing interests may be involved, it would be very helpful to members to understand a bit more about WRD's process in adjudicating waiver applications of this nature.

Further, what, if any impact, does U.S. government funding have on the waiver processing time? Members observe that the posted processing times are much shorter than the actual processing time when U.S. government funding is a factor. Would WRD provide members with an estimate of the amount of additional time necessary to process the waiver request when U.S. government funding is among the triggers?

The WRD requests the opinion of the U.S. government sponsor if the applicant received government funding to participate in the exchange visitor program. Once the opinion of the government sponsor has been received, a waiver review officer reviews the entire case file and makes a recommendation to USCIS. Cases involving government funding have competing interests and usually take longer to process. It is difficult to estimate how long a sponsor will take to respond because it depends on the circumstances in the case, but on average, you can add an additional 30 days to the timeline.

End